

# Exhibit 1

August 14, 2018

*Submitted electronically to [foiar4@fws.gov](mailto:foiar4@fws.gov)*

Tiffany McClurkin  
FOIA Coordinator  
U.S. Fish and Wildlife Service, Region 4  
1875 Century Boulevard  
Atlanta, GA 30345

**Re: Freedom of Information Act Request for Records Relating to Species' Listing  
Statuses; Request for Fee Waiver**

Dear Ms. McClurkin:

Defenders of Wildlife (“Defenders”) and the Southern Environmental Law Center (“SELC”) respectfully submit the following request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and its implementing regulations, 43 C.F.R. §§ 2.1–2.34, seeking the records identified below.

This request seeks records within the custody of Region 4 of the U.S. Fish and Wildlife Service (“the Service”), including any of its field offices, that were created, sent, forwarded, re-sent, received, or reviewed by any officers, employees, agents, or consultants of the Service during the time period from January 20, 2017, until the date of search for records responsive to this request. For purposes of this request, “list” and “de-list” mean, respectively, to add or remove a species from the lists of endangered or threatened wildlife species pursuant to 16 U.S.C. § 1533. “Down-list” means to change a species’ listing status from endangered to threatened.

**REQUESTED RECORDS**

We request the following records from the Service:

1. All records relating to any change, by instruction, guidance, memoranda, or otherwise, to policy, practice, or procedure governing the decision(s) to list, decline to list, de-list, or down-list any species or category of species or to defer or accelerate any such decision;
2. All records relating to any change in the standards, criteria, or review process applicable to decision(s) to list, decline to list, de-list, or down-list any species or category of species, or to defer or accelerate any such decision;
3. All records relating to any existing or proposed quotas, targets, goals, requirements, expectations, or aspirations for listing, declining to list, de-listing, or down-listing species, whether quantitative or qualitative in nature;

4. All records relating to the selection of the 35 species identified in 83 Fed. Reg. 20092 or the 42 species identified in 83 Fed. Reg. 38320 for status reviews;
5. All requests or instructions that staff identify listed species that could potentially be de-listed or down-listed or candidate species for which listing could potentially be declined, and any records created in response to such requests or instruction; and
6. Any and all listing petitions, de-listing petitions, status reviews, or other documents initiating a proposal to list, de-list, or down-list any species, that were forwarded to or reviewed by any of the following person(s), along with any associated responses, instructions, or annotations from the person(s) to whom they were forwarded or by whom they were reviewed:
  - a. Any person other than an employee of the Service in Region 4 or one of its field offices;
  - b. Any person who is an employee of the Service in Region 4 or one of its field offices and:
    - i. Has, at any time since January 20, 2017, been a political appointee (including without limitation any government employee that was appointed by the President, any government employee that was appointed by the Secretary or Administrator of a federal agency, any government employee that has held a Schedule C position, or any employee who has worked in the Executive Office of the President);
    - ii. Has, at any time since January 20, 2017, held a position listed in any version of the document "United States Government Policy and Supporting Positions," otherwise known as the "Plum Book," whether or not the person's actual name appears in a version of the Plum Book;
    - iii. Whose hiring was coordinated with the Presidential Personnel Office; or
    - iv. Who, as a part of their job responsibilities with the Service, communicates with elected officials or their offices.

This request is not intended to exclude any other records that, although not specifically requested, are reasonably related to the subject matter of this request.

For purposes of this request, "records" is defined to the full extent of the meaning of the term under FOIA. This includes, but is not limited to, documents of any type, including both electronic and paper documents, electronic mail, writings (handwritten, typed, electronic or otherwise produced, reproduced or stored), correspondence, letters, memoranda, reports, consultations, papers, studies, notes, field notes, recordings, telephone conversation recordings, voice mails, telephone logs, messages, instant messages, G-chats, text messages, chats, telefaxes, data, databases, drawings, surveys, graphs, charts, photographs, videos, meeting notes or minutes, electronic and magnetic recordings of meetings, maps, Geographic Information System data, GPS, UTM, LiDAR, CDs, and any other compilations of data from which information can be obtained.

This request is being sent to Region 4 of the Service with the understanding that it will be forwarded to any other agency offices where responsive records may be located.

### WITHHELD DOCUMENTS

In regard to the other requested records, under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information pursuant to FOIA unless prohibited by law or the agency reasonably believes release of the information will harm an interest that is protected by a FOIA exemption. 5 U.S.C. § 552(a)(8)(A). Should you decide to invoke a FOIA exemption, please include in your response a description of which responsive documents are withheld with sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by their release. Please include a detailed index identifying:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanation and justification for withholding each record, including the specific exemption(s) under which the record (or portion thereof) is withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination and/or may help to avoid unnecessary litigation.

If you determine that portions of responsive records are exempt from disclosure, please segregate or redact the exempt portions and provide the non-exempt portions within the statutory time limit. 5 U.S.C. § 552(b).

### FORMAT OF REQUESTED RECORDS

Defenders prefers receiving electronic copies of all responsive documents. Under FOIA, you are obligated to provide records in a readily accessible electronic format, if possible, and as requested here. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). As used here, “readily reproducible” electronic documents should include text-searchable and OCR-formatted.

Additionally, please provide the records in .pdf file format, without any “portfolios” or “embedded files” Portfolios and embedded files are not readily accessible. *Please do not provide the records in a single, or “batched,” .pdf file.* We also appreciate the inclusion of an index of responsive records.

### RECORD DELIVERY

We appreciate your assistance in expeditiously responding to this request. As mandated under FOIA, we anticipate a response within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.16(a). We respectfully urge you to post responses to this and parallel FOIA requests online in

accordance with 5 U.S.C. § 552(a)(2)(D)(ii)(II). Defenders is pleased to receive records on a rolling basis if it facilitates the agency's response.

We strongly prefer delivery of the records by Sharefile or a similar FTP or document share service. We are happy to provide a link where you can upload files. Alternatively, you may email or mail copies of the requested records to:

Sam Evans  
Southern Environmental Law Center  
48 Patton Avenue, Suite 304  
Asheville, NC 28801  
[sevans@selcnc.org](mailto:sevans@selcnc.org)  
(828) 258-2023

If you find that this request is unclear, or if responsive records are voluminous, please contact us to discuss the scope of this request.

#### REQUEST FOR FEE WAIVER

Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and the Department of the Interior's implementing regulations, 43 C.F.R. §§ 2.45–2.48, Defenders and SELC request a waiver of all charges (*i.e.*, search, review, and duplication fees) incurred in connection with this request.

FOIA was designed to provide citizens a broad right to access government records. FOIA's basic purpose is to "open agency action to the light of public scrutiny," with a focus on the public's "right to be informed about what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). To provide public access to this information, FOIA's fee waiver provision requires that "[d]ocuments shall be furnished without any charge or at a [reduced] charge" if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA's fee waiver requirement is "liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *accord Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1177–78 (10th Cir. 2005); *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *Community Legal Servs. v. U.S. Dep't of Hous. and Urban Dev.*, 405 F. Supp. 2d 553, 555 (E.D. Pa. 2005).

Congress specifically designed FOIA's 1986 fee waiver amendments to provide non-profit organizations such as Defenders and SELC access to government records without payment of fees. Indeed, the fee waiver provision was intended to "explicitly recognize[] the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals," including nonprofit public interest groups. *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 94 (D.C. Cir. 1986). FOIA "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver." *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Idaho 2004).

## **Requesters Satisfy the Qualifications for a Fee Waiver**

Under FOIA, a requester is entitled to a fee waiver when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [federal] government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 43 C.F.R. § 2.45(a)(1). The Department of the Interior’s (DOI) implementing regulations at 43 C.F.R. § 2.48 establish the same standard, setting forth four factors to consider in determining whether a request meets the FOIA requirement.

Consequently, the Service must consider the following factors to determine whether a request is in the public interest: (1) “[h]ow the requested records concern the operations or activities of the Federal government,” (2) “[h]ow disclosure is likely to contribute to public understanding of those operations or activities,” (3) “[h]ow disclosure is likely to significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject,” and (4) [h]ow the public’s understanding of the subject in question will be enhanced to a significant extent by the disclosure.” 43 C.F. R. § 2.48. As presented below, Requesters satisfy each of these four criteria.

Requesters therefore qualify for a fee waiver. Disclosure of the requested records is in the public interest because it will contribute significantly to public understanding of the operations or activities of the government, particularly as they relate to the management of endangered and threatened species. Protection of rare species and their habitats is a matter of significant public interest in the Southeast. In addition, release of the documents is not for commercial use. Founded in 1947, Defenders is a 501(c)(3) nonprofit conservation organization with 1.2 million members and supporters dedicated to the protection of all native animals and plants in their natural communities. Access to government records through FOIA requests is essential to Defenders’ role of educating the general public about government activities related to wildlife conservation. Defenders has no commercial interest in and will realize no commercial benefit from the release of the requested records. Likewise, SELC is a 501(c)(3) nonprofit conservation organization working to protect the Southern environment, including rare species and habitats in Region 4. While SELC does provide legal services to partner organizations that share its mission, SELC does not charge legal fees for those services and therefore has no commercial interest in obtaining these records.

Please note that the U.S. Fish and Wildlife Service, U.S. Forest Service, Bureau of Land Management and National Park Service have previously granted requests for fee waivers in their provision of documents to Defenders and/or SELC.

### **A. The Requested Records Concern Operations or Activities of the Federal Government**

In accordance with 43 C.F. R. § 2.48(a)(1), the requested records concern the operations and activities of the federal government, namely an executive branch agency, the U.S. Fish and Wildlife Service within the U.S. Department of the Interior, which is charged with listing and altering the listing status of species, pursuant to the Endangered Species Act. 16 U.S.C. § 1533(a)(1), (c). The requested records describe the agency’s views and actions related to rules,

policies, plans and other federal activities concerning management of endangered and threatened species. *See Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted).

B. Disclosure of the Requested Records is Likely to Contribute to Public Understanding of Government Operations or Activities

In accordance with 43 C.F. R. § 2.48(a)(2), the requested records are meaningfully informative about government operations or activities, there is a logical connection between their contents and those operations or activities, and disclosure will contribute to an increased public understanding of the subject matter. Defenders and SELC have the expertise to analyze and publicize the information in a manner that is useful to a broad audience of persons interested in endangered and threatened species.

The information about government operations and activities contained in the requested records will meaningfully inform public understanding of the Service’s management of endangered and threatened species. It will also aid public understanding of department actions that affect endangered and threatened species. This information is highly relevant to Defenders and our members because we are deeply concerned about these issues. Our review and analysis of responsive records will provide the public with critical information about the legal status of endangered and threatened species in the Southeastern United States.

Once the information is made available, we will share it with our many members and supporters, as well as partner organizations which themselves have many additional members and supporters. We will also share the records with members of the media, and we will provide analysis, synthesis, and derivative content that will assist the public in understanding the subject government activities. Defenders’ and SELC’s track records of active participation in oversight of governmental activities and decision-making and our consistent contributions to the public’s understanding of those activities are well established.

Defenders is a national non-profit organization focused on wildlife and habitat conservation and the safeguarding of biodiversity. We inform, educate and counsel the public regarding environmental issues, policies and laws relating to wildlife protection and public lands. We represent our members’ interests in ensuring that imperiled species and their habitat receive the full protections due under federal law. We frequently communicate with our members, supporters, partner organizations, and the interested public on news and information relevant to endangered and threatened species. SELC is a regional non-profit organization focused on protecting the Southern environment. We directly communicate with the public in our region through our own outlets (print and electronic), and we are trusted by the regional media as a reliable source of information about information affecting the Southern environment. Further, we provide legal counsel to partner organizations working in our region, including sharing information relevant to our shared interest in the Southern environment, which they pass along to their own members and supporters.

Defenders and SELC will rely on our own legal and scientific experts, as well as outside experts, to analyze the information contained in records produced in response to this FOIA request. We have used, and will continue to use, a full array of tools to ensure the public’s significant interest



in the appropriate management of endangered and threatened species is vindicated and the general public is informed through our synthesis of the information gleaned from the requested records.

Defenders and SELC will ensure that the information produced in response to this request, and our analysis thereof, is disseminated to a reasonably broad audience of persons interested in federal lands management and wildlife conservation. In disseminating the information, we will assure that it is made available for the benefit of the interested persons beyond our membership, such as members of other conservation advocacy organizations, the media, the academic community, and the general public.

Defenders has the ability to disseminate information obtained from the requested records in a number of ways to a broad audience. We actively communicate with our members, supporters and the general public through direct mail and email campaigns. We broadcast action alerts notifying the public of opportunities to comment on agency proposals; publish information on and frequently update our website (797,055+ visitors per month) and blog (21,000+ monthly readership) to educate the public on wildlife conservation issues; distribute a quarterly print magazine with a circulation of approximately 350,000; communicate with partner organizations both nationally and internationally; maintain an active online presence through Facebook (652,000+ followers), Twitter (109,000+ followers), and YouTube (6900+ subscribers); distribute press releases directly to media contacts and through our website and RSS feed; and educate lawmakers and advocates on conservation law at the federal, state and local level. SELC distributes a quarterly newsletter to 18,000 supporters, a digital newsletter with a circulation of 12,000, and over 40,000 social media followers. Our partners in the region who are also working to protect endangered and rare species have an even broader reach.

C. Disclosure of the Requested Records is Likely to Significantly Contribute to the Understanding of a Reasonably Broad Audience of Persons Interested in the Subject

In accordance with 43 C.F. R. § 2.48(a)(3), the requested information is new, not already publicly available, and its disclosure will increase the level of public understanding that existed prior to disclosure. Through Requesters analysis and dissemination, disclosure of the information contained in the requested records will contribute to the understanding of a broad audience of persons that are interested in endangered and threatened species, as stated above.

The requested records will enable Requesters to provide information to the public at large regarding the current agency views and activities related to rules, policies, plans and other department actions concerning management of endangered and threatened species. This information is essential to inform the public about potential changes to the status of endangered and threatened species. The requested records are new and not currently in the public domain. *See Cmty. Legal Servs. V. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records “clarify important facts” about agency policy, the request “would likely shed light on information that is new to the interested public.”).

Disclosing the requested records to Requesters is not only “likely to contribute,” but is certain to contribute, to public understanding of management of endangered and threatened species and the potential impacts to these species and their protections. At present, the public has no information



about whether there is an existing expectation or goal for altering the listing status of endangered and threatened species, or how such a goal might affect consideration of particular species' statuses. Similarly, the public does not know whether policies or procedures have changed under the current administration with respect to how species' statuses are determined. Requesters' dissemination of this information will therefore provide new insight to a broad audience of interested persons as to the management of endangered and listed species. *See id.* at § 2.48(a)(3).

D. The Public's Understanding of the Subject in Question will be Significantly Enhanced by the Disclosure of Requested Records.

In accordance with 43 C.F.R. § 2.48(a)(4), the public's understanding of the subject of this FOIA request will be enhanced to a *significant extent* by disclosure of the requested records. FOIA's legislative history makes clear that the 'significance' test is met where, as here, the information requested will support "public oversight of agency operations":

A requester is likely to contribute significantly to the public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.

132 Cong. Rec. H9464 (Reps. English and Kindness); *see also McClellan Ecological Seepage Situation*, 835 F.2d at 1284–86.

Disclosure of the requested records will significantly enhance the public's understanding of the agency's management of endangered and threatened species, as compared to the level of understanding that exists prior to disclosure. Disclosure will provide the public with information about how the Department intends to manage its treatment of endangered and threatened species and whether a significant number of species will be delisted or down-listed. The requested records are new information that have not previously been disclosed, and disclosing them will support public oversight of agency operations regarding federal management of endangered or threatened species.

The conservation of federal public lands and waters and the wildlife that depend on them are an ongoing concern for Requesters' members, supporters, partner organizations, and the interested public. The requested records are essential to Requesters' efforts to educate our members and the general public about conservation of imperiled species and their habitat. Our analysis of the records and broad dissemination of the synthesized information will support public participation in government and help ensure that the endangered and threatened species are adequately protected. It will improve the ability of the public to evaluate and supervise the agency and DOI's current and future plans for endangered and threatened species.

## CONCLUSION

For all the foregoing reasons, Requesters satisfy the statutory and regulatory requirements for a fee waiver under FOIA and DOI's implementing regulations. We expect that you will immediately grant this request and tender responsive records.

However, if a fee waiver is denied, Requesters are willing to pay up to \$100.00 in reasonable search time and/or duplication costs exceeding two hours and 100 pages, or equivalent volume. Please contact us to discuss any costs in excess of \$100 prior to fulfilling this FOIA request.

If you determine that this FOIA request will require longer than ten business days to process, please notify me of the request's individualized tracking number and how to obtain status updates via telephone, email or on the Internet. 5 U.S.C. § 552(a)(7). If you anticipate needing more than the 20 working days allotted under FOIA to fully process this request, please also notify me of the expected delay. I appreciate the opportunity to work with the Service to expedite your response.

Thank you for your assistance.

Very sincerely,

A handwritten signature in black ink, appearing to read "Sam Evans", with a stylized, cursive script.

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